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PP (IMMIGRATION)

v.

ANA EKANG & ANOR

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HIGH COURT SABAH & SARAWAK, SIBU
YEW JEN KIE J
[CRIMINAL APPEAL NO: SBW-42A-4-7-2012]
26 NOVEMBER 2012

C ***CRIMINAL LAW:*** *Immigration Act 1959/63 - Section 55B - Employing illegal immigrants without valid work permit - Whether employer must be registered owner or occupier of premises where business operates - Whether employer knowingly employed illegal immigrants - Whether common intention to employ illegal immigrants proven*

D ***CRIMINAL LAW:*** *Immigration Act 1959/63 - Section 55E - Allowing illegal immigrants to enter and remain - Illegal Indonesian workers without valid work pass allowed to live at café premises - Meaning of "occupier" - Whether occupier must be registered owner of premises - Whether care, control and management of premises established*

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CRIMINAL PROCEDURE: *Charge - Defective charge - Whether omission of words "read together with s. 34 of the Penal Code" renders charge bad - Whether irregularity curable under s. 422 of Criminal Procedure Code*

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CRIMINAL PROCEDURE: *Defence - Bare denial - Whether mere denial without proof to reasonably dislodge prosecution's evidence sufficient*

EVIDENCE: *Presumptions - Adverse inference - Failure of defence to produce documents - Whether adverse inference under s. 114(g) of Evidence Act 1950 could be invoked - Whether irresistible and logical inference that documents did not exist*

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The respondents, husband and wife, were jointly charged on two charges. The first charge was in respect of an offence under s. 55B(1) of the Immigration Act 1956/1963 ('the Act') for employing ten illegal Indonesian workers without valid work pass at Masam Masam Manis Café in Sibu ('the Cafe'). The second charge was in respect of an offence under s. 55E(1) of the Act for allowing nine illegal Indonesian immigrants to enter and remain at the Café. The ten illegal Indonesians were working as cooks, waitresses, servers, dish washers and cashier when they were

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arrested. The arrested persons were foreigners who did not possess valid pass. All of these illegal immigrants, except Sonia Misrodi, were named in the second charge as being allowed to enter and live on the premise of the Café. During the raid, both the first and second respondents came to the Cafe and the first respondent handed over the passports of the arrested illegal immigrants. In respect of the first charge, the appellant relied on a memorandum of transfer ("MOT") to prove that the first respondent was the owner of the Cafe. In respect of the second charge, the appellant adduced a tenancy agreement ('P12') to show that the second respondent rented the Cafe premises from PW5. In their defence, both the respondents denied that they had employed illegal immigrants or permitted the illegal immigrants to enter and remain on the premise. They claimed that the second respondent originally entered into a tenancy agreement (P12) with PW5 but he subsequently sub-let it to PW9 as evidenced by another tenancy agreement ('P15'). They claimed that it was PW9 who owned and managed the Café. In acquitting and discharging the respondents, the learned trial judge ("judge") held that the respondents had nothing to do with the Café as they were neither the registered owners nor the occupiers of the Cafe. The appellant appealed against the acquittal and discharge on the grounds that the judge erred in: (i) failing to consider that the word "occupier" under s. 55E(1) of the Act is not necessarily the occupier of the premise; (ii) not following the principle that bare denial is not a defence; (iii) failing to find that the tenancy agreement (P15) was a sham; (iv) failing to consider the depositions recorded under s. 40A of the Act from the illegal immigrants which were *prima facie* evidence; and (v) failing to invoke s. 114(g) of the Evidence Act 1950 for failure on the part of the respondents to adduce rental receipts and for calling witnesses who prepared the tenancy agreement (P15).

Held (allowing appeal in part):

(1) It is not a requisite ingredient of s. 55B(1) of the Act that the employer of illegal workers must be the registered owner or occupier of the premise where the business operates. For the purpose of the first charge, what was needed to be proved was the relationship between the respondents and the ten Indonesian workers. As long as the prosecution could

A prove that the respondents had knowingly employed the ten illegal immigrants whom they knew did not possess valid pass, their non-ownership of the premise where the business was carried out was immaterial and totally irrelevant. In respect of the essential ingredients of the charge under s. 55B(1), the
B appellant had adduced ample credible evidence that a *prima facie* case had been made out. (para 23)

(2) The word "occupier" under s. 55E(1) of the Act is clear and unambiguous. In ordinary and natural sense, the word
C "occupier" does not import a meaning that an occupier must necessarily be the registered owner of the premise. (para 29)

(3) It is trite law that bare denial of the defence must be tested against the entire evidence. Mere denial without other proof to reasonably dislodge the prosecution's evidence is not
D sufficient. (para 39)

(4) Based on the facts, the only logical and irresistible inference was that P15 could not be a genuine tenancy agreement. The judge had fallen into error by not invoking s. 114(g) of the
E Evidence Act 1950 against the second respondent for failing to produce the rental receipts. The irresistible and logical inference from non-production of the alleged receipts was that there were no such receipts. (para 41)

F **(5)** There was clear evidence that the second respondent was in fact and in truth the tenant of the premise pursuant to the tenancy agreement (P12). He was the person and not PW9 who had the care, control and management of the premise. (para 52)

G **(6)** In all the depositions, except P16, the deponents mentioned the name "Boniface Toke" or "Boniface" as their "majikan" or "Tauke". There was no uncertainty that Boniface or Boniface Toke, referred to by the illegal immigrants in P16 was the
H second respondent. (para 55)

(7) When all the evidence were considered in totality, it was clear that notwithstanding the fact that PW9 was the licence holder of the Café at the material time of the raid, the prosecution had adduced clear evidence to show that PW9 was merely a
I proxy of the first and second respondents who actually owned

the first floor of the premise where the illegal immigrants were permitted to enter and live; and it was the second respondent who actually owned the Cafe. (para 69)

(8) The prosecution had proved beyond reasonable doubt that the first and the second respondents had the common intention to employ the illegal immigrants to work in the Café. The omission of the words "read together with s. 34 of the Penal Code" in the first charge was not fatal. Non-compliance of s. 34 of the Penal Code in the charge does not render the charge bad, and such irregularity is curable under s. 422 of the Criminal Procedure Code. Failure to include s. 34 of the Penal Code in the charge does not render the charge bad *(Gunalan a/l Visuanathan v. PP*; refd, *Msimanga Lesaly v. PP;* refd, *Azhar Che Wil v. PP & Another Appeal;* refd). (para 72)

(9) In respect of the second charge, the evidence clearly showed that it was the second respondent who rented the whole premise and it was only he who had the care, control and management of the first floor of the premise where he permitted the illegal immigrants to enter and remain. There was no evidence of the first respondent's involvement. Hence, the common intention element was not proved beyond reasonable doubt. (para 74)

(10) In respect of the first charge, the order of acquittal and discharge of both the respondents was set aside and substituted with an order of conviction against both the respondents. In respect of the second charge, the order of acquittal and discharge against the second respondent was set aside and substituted with an order of conviction whereas the order of discharge and acquittal against the first respondent remained. (para 75)

Case(s) referred to:

Azhar Che Wil v. PP & Another Appeal [2009] 6 CLJ 537 CA ***(refd)***
DA Duncan v. PP [1980] 1 LNS 12 FC ***(refd)***
Darch v. Weight [1984] 2 All ER 245 ***(foll)***
Elizabeth Usha v. PP [2001] 2 SLR 60 ***(foll)***
Gunalan Visuanathan v. PP [2010] 10 CLJ 118 HC ***(refd)***
Msimanga Lesaly v. PP [2004] 1 LNS 651 CA ***(refd)***
Peter Merupi & Anor v. PP [2011] 1 CLJ 716 CA ***(refd)***
PP v. Ling Tee Huah [1980] 1 LNS 212 HC ***(refd)***

A *PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC* ***(refd)***
PP v. Wong Haur Wei [2008] 7 CLJ 200 HC ***(refd)***
R v. Mistry [1980] Crim LR 177 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 422
B Evidence Act 1950, s. 114(g)
Immigration Act 1959/1963, ss. 5B(1), 40A, 55B(1), 55E(1), (7)
Penal Code, s. 34

For the appellant - Steven Beti Anom; DPP
C *For the respondents - Louis Jarau; M/s Gapor & Co Advocates*

Reported by Amutha Suppayah

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JUDGMENT

Yew Jen Kie J:

[1] The respondents, husband and wife, were jointly charged on two charges. The first charge is in respect of an offence under
E s. 55B(1) of the Immigration Act 1959/1963 for employing ten illegal Indonesian workers without valid work pass at Masam Masam Manis Café located at Lot 1196, S/L 31, Tingkat Bawah, Sibu Jaya Commercial Center, Sibu. The second charge is in respect of an offence under s. 55E(1) of the same Act for allowing
F nine illegal Indonesian immigrants to enter and remain at Masam Masam Manis Café at the same address.

[2] The respondents were, after a full trial, acquitted and discharged from both charges.

G **[3]** The appellant now appeals against the order of acquittal and discharge.

[4] The facts of the case show that on 3 August 2010 at about 8.20pm, a raiding team comprising of Immigration Officers and
H Malaysian Anti Corruption Commission ('SPRM') officers led by PW1 Billawati Annuar raided a cafe named Masam Masam Manis Cafe located at Sibu Jaya Commercial Centre at Sibu Division, after an hour of close observation on the shop.

I **[5]** During the raid ten illegal Indonesians who were working as cooks, waitress, servers, dish washers and cashier were arrested. These ten arrested persons named in the first charge are foreigners who did not possess valid pass. All of these illegal

immigrants, except Sonia Misrodi, were also named in the second charge as being allowed to enter and live on the premise of Masam Masam Manis Café.

[6] During the raid both the 1st and 2nd respondents came to the Cafe and the 1st respondent, Ana Anak Ekang, handed over to PW1 the passports of the arrested illegal immigrants. A seizure list (exh. P2 (1-9), was prepared by PW12 and signed by the 1st respondent.

[7] In respect of the first charge under s. 55B(1) of the Act, the appellant relied on the memorandum of transfer (exh. P14) to prove that the 1st respondent Ana Ekang is the owner of Masam Masam Manis Cafe since 3 April 2009 and that both respondents have common intention to employ the ten illegal immigrants.

[8] In respect of the second charge under s. 55E(1) of the Act, the appellant adduced the tenancy agreement (exh. P12) to show that the 2nd respondent Boniface Toke rented from Mr Yong Ling Chiing @ Ching Hong (PW5) a two storey shop lot at Sublot No. 31, Lot 3304 Block 1, Menyan Land District, Sibu (as also known as Lot 1196, S/L 31, Sibu Jaya Commercial Center, Sibu) where Masam Masam Manis Cafe was located on the ground floor, for the period from 19 November 2007 for five years. The appellant relied on exh. P12 to prove that the 1st respondent was the occupier of the premise and that the 1st and 2nd respondents have common intention to permit the illegal immigrants named in the second charge to enter and stay on the premise.

[9] The prosecution also adduced two other documents, namely, the tenancy agreement (exh. P15) and the memorandum of transfer (exh. 14) (MOT).

[10] The MOT dated 3 April 2009 was executed by Hunter Anak Baharudin (PW9) and the 1st respondent Ana Anak Ekang whereby PW9 transferred all his rights shares and interest in Masam Masam Manis Café to 1st respondent in consideration of RM1 paid to him by the 1st respondent.

[11] Exhibit P15 dated 12 February 2008 is a tenancy agreement executed by Hunter Anak Baharudin (PW9) and the 2nd respondent Boniface Toke whereby the 2nd respondent as chief tenant sublet to PW9 as sub-tenant the tenancy of the premise

A at 1196, Ground Floor, Sibu Jaya, Commercial Center, Sublot 31, Lrg Sibu Jaya, Sibu ("the premise') from 12 February 2008 until 11 February 2013.

[12] In addition, the appellant also relied on nine depositions
B (exhs. P 16 (1-9) recorded from the ten illegal immigrants under s. 40 of the Act to corroborate PW1's and PW2's testimony.

The Respondents' Defence

[13] The respondents denied they were employers as they were
C not the registered owners of Masam Masam Manis Cafe. They asserted that the MOT had to be cancelled and did not materialise as 2nd respondent is a government officer (teacher) and cannot be involved in business.

D **[14]** They also denied that they were the occupier of the premises where the illegal immigrants stayed as they are not the registered owners of the premise. The premise had been sublet to PW9 who testified that the tenancy agreement (exh. P15) has not changed since its execution.

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The Appeal

Ground No. 1

[15] I do not see the necessity to deal with ground no. 1 of the
F appeal as what I am going to decide is sufficient to dispose of the appeal without consideration of ground no. 1.

Ground No. 2

[16] In arriving at the decision of acquitting and discharging the
G respondent, the learned trial judge held that the respondents had nothing to do with Masam Masam Manis Café as they were neither the registered owner nor the occupier of the Cafe. As such, "they are not the employer of the illegal immigrant neither allowing the illegal Indonesian immigrants to stay and to remain at
H Masam Masam Manis Cafe as they have no care, control and management of the said premise."

[17] The above decision forms the basis of the complaint in ground no. 2 of the appeal. The complaint here is that the
I learned trial judge failed to consider that the word "employ" in s. 55B(1) of the Act in the first charge does not require that the respondents must be registered owner of the premise.

[18] Learned Deputy Public Prosecutor contended that the word "employ" in s. 55B(1) does not require that an employer must be the registered proprietor of the premise. Since there is no known reported case on this issue in Malaysia, reliance was placed on two Commonwealth cases, namely, an English case of *Darch v. Weight* [1984] 2 All ER 245 wherein Roskill LJ's judgment in *R v. Mistry* [1980] Crim LR 177, CA was cited, wherein the learned judge said:

> Anybody who is in a position to provide shelter to an illegal immigrant is, by reason of the fact that he provides that shelter with knowledge that that person is an illegal immigrant is guilty of the offence. It does not matter whether he did it as a freeholder, a lessee, a licensee, a person with only temporary accommodation or, as Ormrod LJ said, even a squatter in a squat. The question is not in what capacity he is doing it but what he is doing as between himself and the illegal immigrant. If he offers the illegal immigrant shelter for him or her, then whatever his right or lack of right in those premises, whatever his title or interest or lack of it. he is in our view plainly guilty.

[19] The second case is a Singapore case of *Elizabeth Usha v. PP* [2001] 2 SLR 60, where Yong Pung How CJ held:

> The only issue it had to deal with in this appeal was really the question of whether or not a non-owner occupier of premises can be found guilty of harbouring illegal immigrants found on those premises. It is clear from the above propositions derived from the earlier cases that the person providing the shelter Lot 1488 or food to the immigration offender need not necessarily be the owner of the premises ...

[20] Learned Deputy Public Prosecutor submitted that although the two cases above are concerned with "harbouring" and not "employing", they are relevant as analogy to show that the person who "harbours" or "employs" illegal immigrants need not have interest or rights in the premise. The cases show that the issue is what was done between the accused and the illegal immigrants and not in what capacity the accused committed the crime.

[21] Section 55B(1) of the Act states:

> Any person who employs one or more persons, other than a citizen or a holder of an Entry Permit, who is not in possession of a valid pass shall be guilty of an offence and shall, on

A conviction, be liable to a fine of not less than ten thousand ringgit but not more than fifty thousand or to imprisonment for a term not exceeding twelve months or to both for each such employee.

[22] From a careful perusal of this section, the essential ingredients of s. 55B(1) of the Act are:

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(a) Employ one or more persons; and

(b) That person(s) does not possess a valid pass.

C See: *PP v. Wong Haur Wei* [2008] 7 CLJ 200; [2008] 1 MLJ 670.

[23] I am therefore in agreement with the learned Deputy Public Prosecutor that it is not a requisite ingredient of s. 55B(1) of the Immigration Act that the employer of illegal workers must be the registered owner or occupier of the premise where the business D operates. For the purpose of the first charge, what is needed to be proved is the relationship between the respondents and the ten Indonesian workers. As long as the prosecution can prove that the respondents had knowingly employed the ten illegal immigrants whom they knew did not possess valid pass, their non ownership E of the premise where the business was carried out is immaterial and totally irrelevant.

[24] In respect of the essential ingredients of the charge under s. 55B(1), the appellant had adduced ample credible evidence to F satisfy the learned trial judge that a *prima facie* case had been made out and to call upon the respondents to enter on their defence.

[25] In light of the above, I find merit in this ground of appeal.

G *Ground No. 3*

[26] The complaint here is that the trial judge had misdirected himself for failing to consider that the word "occupier" under s. 55E(1) of the Act is not necessarily the occupier of the H premise.

[27] Section 55E(1) of the Act states:

No occupier shall permit any illegal immigrant to enter or remain at any premises.

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[28] "Occupier" is defined under s. 55E(7) of the same Act which states that in relation to any premises, means any person having the charge, management or control of the premises.

[29] Learned deputy submitted - which, I concur, the word "occupier" under s. 55E(1) of the Act 1959 is clear and unambiguous. In ordinary and natural sense the word "occupier" does not import a meaning that occupier must necessarily be the registered owner of the premise.

[30] In *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713, the Federal Court reiterated the principle that:

> The primary duty of the court is to give effect to the intention of the Legislature in the words used by it. It is a well established canon of interpretation that the intent of the legislature is to be gathered from the words used and that if the words used have not acquired any technical meaning. They should be deemed to have been used in there ordinary meaning. If the words of the statute are in themselves precise and unambiguous. then no more is necessary than to expound those words in their natural and ordinary sense. The words themselves alone in such cases best declare the intent of the law give.

[31] Applying the same principle enunciated in *Darch v. Weight* case, *supra*, and *Elizabeth Usha* cases, *supra*, by way of analogy, and upon careful reading of s. 55E(1) and the definition on "occupier", an occupier need not be the owner of the premise where the illegal immigrants were permitted to enter and remain.

[32] In the premise, I find merits in this ground of appeal.

Grounds Nos. 4, 5, 6 and 7

[33] I opine that these grounds can be considered together as they are inter-related.

[34] The complaint in ground no. 4 is that the learned trial judge erred in not following the principle that bare denial is not a defence.

[35] The complaint in ground no. 5 is that the learned trial judge misdirected himself by relying on fanciful doubt and failed to find that the tenancy agreement (P15) is a sham.

[36] The complaint under ground no. 6 is that the learned trial judge erred in failing to consider the depositions recorded under s. 40A of the Act which are *prima facie* evidence.

[37] The complaint in ground no. 7 is that the learned trial judge erred in failing to invoke s. 114(g) of the Evidence Act 1950 for failure on the part of the respondent to adduce rental receipts and for calling witnesses who prepared the tenancy agreement (P15).

[38] In their defence both the respondents denied that they had employed illegal immigrants or permitted the illegal immigrants to enter and remain on the premise. It is their common testimony that 2nd respondent Boniface Toke (DW1) originally entered into a tenancy agreement (P12) with PW5 but he subsequently sub-let it to PW9 as evidenced by the tenancy agreement (P15). It was PW9 who owned and managed the Masam Masam Manis Café on the ground floor of the premise. As PW9 was not prompt in paying rental, they decided to take back the premise to do business and hence the MOT was executed. However, the MOT had to be cancelled and was not registered as the transfer did not materialise. The reason was that the 2nd respondent, as a teacher with the Education Department, cannot be involved in business. Further, the Sibu District Officer and Sibu Rural District Council did not approve the transfer.

[39] It is trite law that bare denial of the defence must be tested against the entire evidence. See, *DA Duncan v. PP* [1980] 1 LNS 12; [1980] 2 MLJ 195 and *Peter Merupi & Anor v. PP* [2011] 1 CLJ 716; [2011] 6 MLJ 340]. Further, mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient. See *PP v. Ling Tee Huah* [1980] 1 LNS 212.

The Tenancy Agreement (P15) Between Boniface Toke And Hunter

[40] Under the tenancy agreement ie, exh. P12 executed between the 2nd respondent (DW1)and PW5 (registered owner cum landlord of the premise), the monthly rental was RM2,000. It was DW1's testimony that he originally rented the premise with the intention of doing business but it did not materialise because he is a civil servant. Hence he sublet it to PW9 *vide* the tenancy agreement ie, exh. P15. Under exh. P15 the monthly rental was RM500. This means that DW1 sublet the premise for RM1,500 less than the rental he paid to PW5. When DW1 was cross-examined on this, he explained that for tax and stamp duty

purpose, only RM500 was stated in exh. P15 but in actual fact he collected RM2,500 from PW9. Later, in another breath, he said that he rented it to PW9 for RM2,000. His explanation for not terminating the tenancy agreement (P12) with PW5 is, amongst other, "I do not want the two storey shoplots be taken by others as the place is a strategic location for business in the future." In re-examination DW1 said that the actual rental was RM2,000 per month.

[41] Based on the monthly rental of RM500 stated in exh. P15 compared with the monthly rental of RM2,000 stated in exh. P12, the 2nd respondent would be paying an annual rental of RM24,000 to PW5 while he only received RM6,000 yearly from PW9, making a loss of RM18,000 per year in rental. For a period of five years, the total shortfall would amount to RM90,000. Which reasonable man would enter into such a logic defying deal or arrangement? The only logical and irresistible inference from this incredulous arrangement is that P15 cannot be a genuine tenancy agreement as claimed by DW1.

[42] That P15 is a sham agreement is made even more vivid when DW1 could not give consistent answers on the alleged actual rental he collected from PW9. At first he said that the actual rental collected was RM2,500 but in another breath, it was changed to RM2,000. Finally he said it was RM2,000 per month. The inconsistency only shows that no such alleged rental was ever paid by PW9.

[43] DW1 said that he had rental receipts that he kept at home and did not bring to court. To my mind, if it was true that DW1 had actually collected RM2,000 from PW9 as alleged and it can be proved by production of receipts, there is no reason why he would leave them at home or not ask for time to produce them. In my judgment, the learned trial judge had fallen into error by not invoking s. 114(g) of the Evidence Act 1950 against the 2nd respondent (DW1) for failing to produce the rental receipts. The irresistible and logical inference from non-production of the alleged receipts is that there was no such receipts. I say so because the tenancy agreement ie, exh. P15 is a sham. Further, I also find that the learned trial judge had misdirected himself by relying on fanciful doubt and by failing to find that exh. P15 is a sham agreement.

Whether DW1 Sublet Both The Ground And First Floors Of The Premise?

[44] In his testimony the DW1 said that both the first floor and ground floor of the premise were sublet to PW9 and therefore he had no control, care and management of the ground floor where Masam Masam Manis Café is located. As such he could not have employed the illegal immigrants as stated in the charge preferred against him. As he did not have possession, control and management of the first floor, he also could not have permitted the illegal immigrants to enter and stay on the first floor of the premise.

[45] Under "particulars of property" of the first schedule of the tenancy agreement ie, exh. P12, it is states "All that portion of land together with one unit of 2-Storey Shophouse containing on area of 161.9 sq. metres, more or less and known as sublot No. 31 and comprised in Parent Lot 3304 Block Menyon Land District".

[46] In the same agreement under "description of the demised premise" it is stated, "the whole building of the said property known as Sublot No. 31 of Lot 3304 Block 1 Menyon Land District."

[47] Based on the above particulars and description, it is vividly clear that under the tenancy agreement ie, exh. P12, the whole building of the premise has been leased out to the 2nd respondent.

[48] A careful perusal of the tenancy agreement ie, exh. P15 shows that the 2nd respondent had sublet to PW9 the premise at 1196, G/F. Sibu Jaya Commercial Centre, Sublot 31, Lorong Sibu Jaya, Sibu. In other words, the 2nd respondent allegedly only rented out the ground floor (G/F) of the premise to PW9.

[49] DW1, in insisting that he had sublet to PW9 both the first floor and ground floor of the premise to PW9, explained that exh. P15 was prepared by people service. He said that he showed the lady in the office at the people service a copy of the tenancy agreement ie, P12 and told her that he wanted to sublet the ground floor and the first floor of the premise. However, he did not look at the contents of exh. P15 when he signed assuming them to be in order. He did not realise that "G/F" was inserted in P15 until it was pointed out to him in court during the trial.

[50] DW1 did not say the purpose for which he gave a copy of exh. P12 to the officer at people service. If the purpose was to follow "description of the demised premise" as appeared in the schedule one of exh. P12, there would be no reason why "G/F" instead of "the whole building" of the premise was inserted in exh. P15.

[51] Common sense dictates that the person who prepared the agreement would base it on the information and particulars supplied by the parties to the agreement. The fact that "G/F" is inserted in exh. P15 only goes to show that the 2nd respondent must have supplied the information. The fact that the 2nd respondent signed exh. P15 only goes to show that he agreed to the terms and conditions stated therein. In any event, I have earlier found that exh. P15 is a sham.

[52] In light of the above, there is clear evidence that the 2nd respondent is in fact and in truth the tenant of the premise pursuant to the tenancy agreement ie, exh. P12. He is the person and not PW9 who has the care, control and management of the premise.

Identity Of The Second Respondent - Boniface Toke

[53] The learned trial judge in his grounds of judgment said that during the recording of the depositions from the ten illegal immigrants, neither the 2nd respondent nor his photographs were shown to the deponents for identification. As such, there is uncertainty whether the person who was referred to by the illegal immigrants in their depositions ie, P16 (1-9) was the 2nd respondent. Such doubt, said the learned trial judge, should be resolved for the benefit of the 2nd respondent.

[54] Learned counsel for the respondents contended that in absence of identification by way of photographs, the person referred to in the depositions of the ten illegal immigrants could be PW9.

[55] In all the depositions, except P16 (7), the deponents mentioned the name "Boniface Toke" or "Boniface" as their "majikan" or "Tauke". Deponent Eko Purwando Pawadi of P16(5) referred to Boniface as "boss" and "cigku". Deponent Lilid Karlina of P16(8) stated in para. 9 thereof "Semasa hari tangkapan, majikan tiada di kedai, Rinda iaitu Kasmiatun Rikan telah telephone majikan.

[56] The deposition of Lilid Karlina ie, P16(8) is consistent with PW1's testimony that during the raid she asked the workers in the Café to produce their identification card. Thereupon Kasmiatun Rikan informed that the identification cards were kept by the employers and then she called her employers. Thereafter the 1st respondent Ana Ekang and the 2nd respondent Boniface Toke came to the Cafe and the 1st respondent gave her the passports of all the illegal workers arrested. PW1 identified both respondents (then accuseds) as Aka Ekang and Boniface.

[57] During the cross-examination of PW1, though the defence put to her that Ana Ekang never told her that she (Ana Ekang) was the employer, it is to be noted that the defence counsel never put to PW1 that the actual employer of these illegal immigrants was Hunter Baharudin (PW9) or that the respondents had told PW1 so when they came to the shop.

[58] To my mind, there is no uncertainty that Boniface or Boniface Toke, a teacher by profession, referred to by the illegal immigrants in P16 (1-9) is the Boniface Toke ie, the 2nd respondent in the case.

The MOT

[59] The 1st respondent Ana Ekang told the court that as PW9 was always late in rental payment, she and the 2nd respondent decided to take it back to do business themselves. However, the MOT had to be cancelled because as a government officer she was not permitted to get involved with business.

[60] Learned trial judge believed and accepted her testimony.

[61] In my judgement, there cannot be any truth in the 2nd respondent's above explanation. I say so because neither the 1st respondent nor the 2nd respondent are new in teaching profession. As confirmed teachers they ought to know that the provision in the general order prohibits civil servants from engaging in business without approval of the head of department. Further, based on the 2nd respondent's (DW1) testimony (which, in my view, also cannot be true), he told the court that he originally rented the premise from PW5 as he wanted to do business but then he could not because he was a government officer. This goes to show that as far back as 2008, both respondents knew that

government officers cannot be involved in business. That being the case, it makes no sense why they would again think of taking back the premise to do business and executed the MOT with PW9, only to cancel it because she is a teacher and cannot be involved with business.

[62] It will be recalled that in cross-examination of PW9, it was put to him that PW9 transferred the business in Masam Masam Manis Café to the 2nd respondent to avoid being charged and PW9 disagreed. The defence case that was put forth to PW9 is so different from the explanation offered by the 2nd respondent in her defence ie, PW9 was not prompt in rental payment and decided to take back the premise to do business.

[63] Further, PW9 disagreed in his cross-examination that the business in Masam Masam Manis Café was never transferred to the 2nd respondent and that PW9 is still the licence holder of Masam Masam Manis Café. It was never put to him that the 2nd respondent had told him that the MOT had to be cancelled because she is a government officer and cannot engage in business.

[64] In my judgement, the 2nd respondent's defence is clearly an afterthought. Even though there is evidence from PW3 (Registrar of business names with Sibu District Office) and PW4 (Environment Health Officer with Sibu Rural District Council) that showed that based on the official record, PW9 was at the material time of the offence the licence holder of Masam Masam Manis Café, the 2nd respondent is in truth and in fact the owner of Masam Masam Manis Café.

Surrender Of Passports And Seizure List

[65] In their defence the 1st and 2nd respondents said that at the time of the raid, they went to Masam Masam Manis Café to collect rental from PW9. The 2nd respondent said that she was forced to sign the seizure lift but she did not elaborate how she was forced.

[66] To my mind, if it were true that PW9 was the employer and owner as alleged, logic dictates that the 1st and 2nd respondent would, at the first opportunity, have told PW1 that PW9 was the sub-tenant of the premise and the owner of Masam Masam Manis

A Café and that they just happened to be at the premise to collect rental from PW9. They did not do that. Instead 1st respondent Ana Ekang surrendered six passports of the Indonesian workers and signed the seizure list.

B **[67]** In the seizure list P2 (1-12), it is stated, amongst others, six passports were seized. To my mind, the 1st respondent's bare allegation that she was forced to sign should not be believed. I say so because it is a departure from the case put up in cross-examination of PW1 and PW13, that is, P2 was blank when the C 1st respondent signed it. The 1st respondent had not given a credible explanation as to how she came into possession of the passports of the Indonesian workers. This is inconsistent with the defence allegation that PW9 was the owner of Masam Masam Manis Café and the employer of the illegal workers.

D **[68]** In my judgment, the learned trial judge had misdirected himself by failing to consider the following credible direct evidence:

(a) PW1's testimony that Masam Masam Manis Cafe was under observation for about an hour before the raid.

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(b) During the raid, PW1 found there were ten foreign workers and three local workers. The ten foreign workers are named Nana, Kasmiatun, Lina, Lilis, Sonia, Nengsih, Eko, Ripa, Silam and Juraini.

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(c) According PW1, Nana was washing the dishes, Kasmiatun was the cashier at the counter, Nengsih was cooking, Sonia was helping Nengsih in the kitchen and the rest were taking orders and serving customers.

G (d) The arrested illegal Indonesians admitted in their depositions P16 (1-9) that they were working for the respondents without any valid passes.

(e) Kasmiatu called their employers and this is corroborated by H the deposition of Lilid Karlina ie, exh. P16(8). Thereafter both respondents came to the cafe to surrender six passports of the workers. The respondents admitted to PW1 that they were the employers of the ten illegal Indonesian workers. The seizure list exh. P2 (1-9) prepared by PW13 and signed by the I 1st respondent indicated the seizure of six passports.

(f) PW1's testimony that the respondents and all the Indonesian workers failed to produce the passports upon demand.

(g) PW1's testimony that out of the six passports, the passport of Nana Mardiana had temporary employment visit pass as a maid to Boniface Toke at 21 Lorong 12 Jalan Permai Barat 96000 Sibu, the passport of Kasmiatun Rikan (identified *vide* photograph marked P13(d) has a termporary employment visit pass as a maid to Manggah anak Maragat. The rest of the passports were endorsed with social visit pass only.

(h) The tenancy agreement ie, exh. P12 showed that the 2nd respondent had rented the whole Premise from PW5 for a period from 19 November 2007 for a period of five years.

(i) The MOT ie, exh. P14 showed that PW9 had transferred his interest, rights and shares in Masam Masam Manis Cafe to the 1st respondent on 3 April 2009.

[69] When all the evidence are considered in totality, it is clear that notwithstanding the fact that PW9 is still the licence holder of Masam Masam Manis Café at the material time of the raid, the prosecution has adduced clear evidence to show that PW9 is merely a proxy of the 1st and 2nd respondents who actually owned the 1st floor of the premise where the illegal immigrants were permitted to enter and live; and it was the 2nd respondent who actually own Masam Masam Manis Cafe.

Common Intention

[70] In his grounds of judgment, the learned trial judge said that the words "read together with s. 34 of the Penal Code" are missing from the 1st and 2nd amended charges and took exception to the poorly framed charges and refused to cure this irregularity under s. 422 of the Criminal Procedure Code. The learned trial judge further found that the appellant had failed to adduce "credible evidence" to show common intention existed between the two respondents to commit the offences named in the two amended charges.

[71] As regard the charge under s. 55B(1) offence (1st charge), the evidence adduced in court shows that although it was the 1st respondent Ana Ekang who owned the business in Masam Masam Manis Café, the fact that the 2nd respondent Boniface Toke was also involved in the Cafe business is vividly revealed in the depositions ie, P16 (1-9) where the deponents referred to Boniface

as their "majikan" or "tauke" (employers). Thus, the prosecution has proved beyond reasonable doubt that the 1st and the 2nd respondents have the common intention to employ the illegal immigrants to work in Masam Masam Manis Café.

[72] To my mind, the omission of the words "read together with s. 34 of the Penal Code" in the first charge is not fatal. See, *Gunalan Visuanathan v. PP* [2010] 10 CLJ 118; [2010] 7 MLJ 490 and Federal Court case *Msimanga Lesaly v. PP* [2004] 1 LNS 651 where it was held that non-compliance of s. 34 of the Penal Code in the charge does not render the charge bad, and such irregularity is curable under s. 422 of the Criminal Procedure Code.

[73] Furthermore, failure to include s. 34 of the Penal Code in the charge does not render the charge bad. See, *Azhar Che Wil v. PP & Another Appeal* [2009] 6 CLJ 537 CA which cited *Msimanga Lesaly*, *supra*, where Gopal Sri Ram JCA (as he then was), in delivering the judgment of the Federal Court, said:

> That in our view does not render the charge bad. For it is well settled law that s. 34 of the Penal Code does not create a substantive offence but is merely a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons: *Chota Abdul Razak v. Public Prosecutor* [1991] 1 LNS 21; [1991] 3 MLJ 77. ln *Teh Thiam Huat v. Public Prosecutor* [1996] 3 SLR 637.

[74] In respect of the second charge under s. 55E(1) offence (2nd charge), the evidence clearly shows that it was the 2nd respondent who rented the whole premise and it was only he who had the care, control and management of the 1st floor of the premise where he permitted the illegal immigrants to enter and remain. There is no evidence of the 1st respondent's involvement. Hence, the common intention element is not proved beyond reasonable doubt.

Conclusion

[75] In conclusion and based on all the reasons aforesaid, I am satisfied that there is miscarriage of justice as the learned trial judge had misdirected himself by taking into account irrelevant consideration while disregarding those relevant and pertinent evidence. Hence, I allow the appeal in part and order as follows:

(a) In respect of the first charge under s. 55B(1) of the Immigration Act, the order of acquittal and discharge of the 1st and 2nd respondents be set aside and substituted with an order of conviction against both the 1st and 2nd respondents.

(b) In respect of the 2nd charge under s. 55E(1) of the Act, the order of acquittal and discharge against the 2nd respondent Boniface Toke be set aside be and substituted with an order of conviction whereas the order of discharge and acquittal against the 1st respondent Ana Ekang remains.

(c) I order the case be remitted to the Sessions Court for sentencing forthwith.